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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 937.

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, AND THE CITY OF COLUMBUS, OHIO.

MEMORANDUM OF APPELLANT AGAINST THE MOTION TO DISMISS.

The complete answer to the city's motion to dismiss is that the claimed ground therefor does not exist. The motion and the argument in support thereof are based upon the proposition that the order of the Supreme Court of Ohio, dated March 30, 1934, was a new judgment and was one asked for by appellant. That this is not such a case is conclusively shown by a brief review of what occurred.

On June 21, 1933, the Supreme Court of Ohio, finding that the ordinance of the city of Columbus, Ohio, was neither unlawful nor unreasonable, reversed the order of the commission substituting the 55 cent rate and remanded the cause to the commission "for further proceedings and orders not inconsistent with this entry."

An appeal was docketed in this court as No. 608, current term. At the argument in this court on March 13, 1934, this court questioned the finality of that judgment, and inquired of counsel whether under said judgment the commission could fix any rate other than the 48 cent ordinance rate. Counsel for appellant answered in the negative, basing their conclusion upon the statutes of Ohio and the universal practice thereunder. Counsel for the city of Columbus erroneously contended that under the statutes of Ohio the commission could under said judgment fix some other rate.

Because of this difference of opinion between counsel, and the fact that there was no decision of the Supreme Court of Ohio on the particular point, this court, on March 19, 1934, entered the following journal entry in said Case No. 608:

> "The appeal herein is dismissed for the want of a final judgment."

To meet this situation appellant moved the Ohio Supreme Court to clarify its judgment and settle the question of whether that judgment did or did not end the litigation below, and thus determine the right of appellant to a review of the judgment by an appeal to this

court. Our motion in the court below will be found at page 3242 of the record in this appeal, No. 937.

The reason for the motion is stated therein. The fact that this court had dismissed appellant's appeal in Case 608 was stated and the above journal entry of this court was attached as an exhibit to the motion. The claim now made by the city that appellant had other reasons for making the motion in the court below is gratuitous and without the slightest foundation in the record. This court will not entertain any such unwarranted assumption. In **Embry v. Palmer**, 107 U. S., 3, 20, this court said:

> "Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review."

This statement was reiterated in **Gilfillan v. McKee**, 159 U. S., 302.

That appellant did not ask for a new judgment is certain. Not only does the motion show on its face that appellant merely asked that the meaning and effect of the existing judgment be settled for the purposes of an appeal to this court, but the motion contained the following specific statement:

> "**No application is here made for any new order or different judgment.** Movant recognizes that if the Public Utilities Commission of Ohio may in any

manner change the ordinance rate the judgment herein is not final."

On March 30, 1934, (R., 3244-45), the Ohio Supreme Court while stating that it overruled our motion "except as hereinafter stated," ordered that its judgment entry of June 21, 1933,

"be and the same hereby is corrected and modified to read as follows:".

There was then set out in the entry of March 30, 1934, the same language as contained in the journal entry of June 21, 1933, except that for the words

"for further proceedings and orders not inconsistent with this entry"

there were substituted the words

"forthwith to fix said forty-eight cent rate in accordance with this entry."

The sentence in question as corrected and modified then read:

"And this cause is hereby remanded to the Public Utilities Commission of Ohio, forthwith to fix said forty-eight cent rate in accordance with this entry."

Notwithstanding the Ohio Supreme Court had overruled our motion and had of its own volition entered an order which might be construed as a new judgment, we filed in this court a petition for rehearing in said Cause No. 608 and a motion for certiorari to correct diminution of the record, to bring before this court these further proceedings in the court below. Realizing, however, that

this court might regard the order of March 30, 1934, as a final judgment as of that date, we also perfected a new appeal therefrom, being this case, No. 937, and presented both methods of review to this court.

This court has treated the judgment of March 30, 1934, as the final judgment below by denying our petition for rehearing in Case 608 and noting jurisdiction and assigning Case 937 for hearing on April 30, 1934.

Counsel for the city of Columbus now seek to take advantage of a situation brought about by their own erroneous claims made to this court during the argument of Case 608, and to turn the order of the Supreme Court of Ohio, dated March 30, 1934, made by that court for the purpose of clearing the way for an appeal, but made in a form for which appellant did not move and over which it had no control, into an estoppel of an appeal therefrom. Estoppels are sometimes interposed by courts to prevent unjustified litigation, but never to give a party an unfair advantage or to hinder a speedy determination of the rights of litigants.

The suggestion by counsel for the city that the appeal in Case 937 might be too late is without merit. The time for appeal dates from March 30, 1934, when the final judgment was entered.

United States v. Gomez, 68 U. S., 690.
Providence Rubber Co. v. Goodyear, 73 U. S. (6 Wall.), 153.
Borer v. Chapman, 119 U. S., 587.
Charles v. Frawley, 71 Ohio St., 50.
Perfection Stove Co. v. Scherer, 120 Ohio St., 445.
3 Corpus Juris, pp. 1058, 1059.

The cases cited by counsel for the city are not in point because they deal with entirely different sets of facts. On the contrary, in one of the cases cited by the city, **United States v. St. Louis & M. Valley Transp. Co.**, 184 U. S., 247, 249, in which this court denied a somewhat similar motion, this court said:

> "Obviously the changes or modifications in the findings, at the instance of the defendant, were intended by the court to enable the case of the defendant to be most advantageously presented for review by the court below on the motions for a new trial, and by this court on appeal."

Even if appellant had moved for the judgment entered below, it would not under the circumstances of this case estop an appeal.

The motion here was made because further action by the Supreme Court of Ohio was necessary to a review of its judgment by this court on appeal. The securing of such action by a party has never been held to create an estoppel of an appeal. The distinction between such cases and the cases cited by the city involving "invited error" and "consent decrees" is clear cut and thoroughly established.

The rule applicable to our case is stated by the United States Circuit Court of Appeals for the Seventh Circuit in **Chicago Dollar Directory Co. v. Chicago Dir. Co.**, 65 Fed., 463:

> "By asking the court to cause the orders which it had actually made to be corrected of record, the appellants did not assent to the correctness of the orders, nor waive their right of appeal therefrom.

While the decision was adverse to their contention, they had an interest in having the orders actually made correctly entered of record; and their request to have this done will not bar their right of appeal.'' (Boldface ours.)

In **Butte & B. Consol. Min. Co. v. Montana O. P. Co.,** 121 Fed., 524, the United States Circuit Court for the Ninth Circuit said:

''If it were true that the plaintiff in an action, by moving the court to put in proper form and in the shape of a judgment its conclusion already reached, must thereby lose his right to review the judgment, the defendant in the case might eventually deprive him of that right by refusing to move for the entry of a judgment. All the cases cited by defendant in error in support of its motion are cases in which the plaintiff in error or the party appealing has in some way acquiesced in the judgment, or accepted the fruits thereof, or consented thereto. None of these features occur in the present case.'' (Boldface ours.)

In **Carlson v. Benton,** 66 Neb., 486, 92 N. W., 600, the Supreme Court of Nebraska said:

''The judgment is the logical product of the prior proceedings in the case. With the record of such proceedings before it, the court not only had authority, but it was its duty, to render the judgment. It is also true the record shows that the judgment was rendered on the plaintiff's motion. The motion was made at a term subsequent to the term at which his motion for a new trial had been denied. He had a right to a hearing in the court of last resort. A final judgment was necessary to that end. **It would be a mockery of justice to deny him a hearing in this court because he asked the trial court to do that without which he could not obtain such hearing.''** (Boldface ours.)

In **Warner v. Lockerby**, 28 Minn., 28, 8 N. W., 879, the Supreme Court of Minnesota said:

> "The respondent makes the point that the appellant, having himself caused the judgment to be entered, is estopped from appealing from such judgment. There is nothing to this point. **Either party may cause judgment to be entered in accordance with the verdict. The defeated party may cause this to be done so that he may be placed in a position to take his appeal.**" (Boldface ours.)

In **Eby v. Larkin**, 53 Wash., 454, 102 Pac., 236, the Supreme Court of Washington said:

> "The court had announced its conclusion of law based upon those facts, and appellant could only hope to obtain what she assumed to be a proper conclusion of law and judgment by appeal. She had already submitted the facts to the court, and the court had ruled against her contention. She had a right to have such ruling entered of record in order that she might appeal therefrom. She did not invite the error, if any, of the court. She contested all through the case her right to a larger judgment upon the facts found; but, the court ruling otherwise, she did nothing which would deprive her of her appeal by insisting that the record show such a finality as to enable her to prosecute her appeal. * * * **The fact that a litigant enters a judgment * * * in order to appeal therefrom does not preclude him from questioning the error of that judgment in denying him all the relief claimed by him.**" (Boldface ours.)

In **Saunders v. Busch-Everett Co.**, 138 La., 1049, 71 So., 153, the Supreme Court of Louisiana said:

> "An acquiescence such as will take away the right of appeal must be unconditional, voluntary, and ab-

solute, and have been made with intent to acquiesce and abandon the right of appeal."

In **Stevenson v. Matteson**, 13 Mont., 108, 32 Pac., 291, the Supreme Court of Montana said:

> "* * * and his asking the court to do its duty, or to render such judgment as would allow of an appeal, was not such a consent to the judgment as to debar him of the right to appeal. * * * In the case at bar the appellant was so placed, after the sustainjng of the demurrer, that he was compelled to ask the court to enter the proper judgment, so he could appeal."

See also:

Chicago Bd. of Education v. Frank, 64 Ill. App., 367.
Mechem v. McKay, 37 Cal., 154.
Henry v. Gibson, 55 Mo., 570.
Matter of Gall, 62 N. Y. S., 420.

The principle universally followed is summed up in the following statements in Corpus Juris:

3 Corpus Juris, 670:

> "The mere fact that a judgment or order was formally entered on the motion of appellant is not a recognition of its validity and does not affect his right to appeal therefrom, such entry being necessary for appeal."

3 Corpus Juris, 674:

> "Although a party who voluntarily procures the rendition or entry of a judgment, order, or decree is generally deemed to consent thereto and cannot appeal or bring error to reverse the same, a motion or stipulation for, or consent to, the mere formal entry

> of a judgment, order, or decree in conformity with a previous finding of fact and law or decision of the court is not a consent to the judgment, order or decree, so as to constitute a waiver of the right of appeal, as such entry is necessary to a hearing in the appellate court."

That this was a judgment "in conformity to a previous * * * decision of the court" is shown by the fact that the judgment of March 30, 1934, was entered "as of the date of June 21, 1933," the date on which the opinion of the court was filed and the original judgment entered.

None of the cases cited by counsel for the city support their motion.

In **United States v. Memphis**, 97 U. S., 284, the appellant was attempting to complain because the court below omitted from its judgment certain things which he had specifically stated in his original pleadings should be omitted.

We have already shown that the case of **United States v. St. Louis & M. V. Transp. Co.**, supra, is contrary to their claim, and recognizes the propriety of the court below amending the record for the purpose of clarifying and aiding a review on appeal.

In **Mercelis v. Wilson**, 235 U. S., 579, the appellant was not permitted to complain of the court below adopting a theory as to the nature of the case which appellant himself had adopted in an amended petition which he had secured leave to file during the hearing.

In **Pacific Railroad Co. v. Ketchum**, 101 U. S., 289, the

railroad was not permitted to appeal from a judgment below which was in accordance with admissions made in its answer filed in the case, and which the record showed was a consent decree, participated in by the railroad.

In the case of **National Loan & Invest. Co. v. Rockland Co.**, 94 Fed., 335, the plaintiff in error attempted to urge the claim that there was **no evidence to support** a finding which it had expressly asked the court to make.

In **Francisco v. Chicago & A. R. Co.**, 149 Fed., 354, the plaintiff in error had in the court below asked that a non-suit be substituted instead of a directed verdict which the court had granted, thus preserving to himself the right to bring a new action. His request was granted, and then instead of bringing a new action, he attempted to prosecute error from the judgment of non-suit. The appellate court dismissed the proceeding.

The state cases cited by counsel for the city are in the same category. They involve "consent decrees" and cases of "invited error." Counsel seek to ignore the clear distinction between such cases and our case, wherein the court below not only declined to follow our motion, but adopted its own method of making its judgment one reviewable by this court on appeal.

Respectfully submitted,

EDWARD C. TURNER,

ALBERT M. CALLAND,

Counsel for Appellant.

Columbus, Ohio, April 25, 1934.